

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

KIDDY ENTERPRISES, INC.

PLAINTIFF

V.

NO. 1:95CV298-B-D

PLUMROSE USA, INC.

DEFENDANT

MEMORANDUM OPINION

This cause comes before the court on the plaintiff's motion to remand and the defendant's motion to dismiss on the grounds of insufficiency of process and service of process and lack of personal jurisdiction. This cause was removed on the ground of diversity jurisdiction. The plaintiff timely moved to remand on the ground of a procedural defect pursuant to 28 U.S.C. § 1447(c). The plaintiff asserts that the defendant did not remove this action within the prescribed thirty-day period under 28 U.S.C. § 1446(b) which provides in part:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(Emphasis added.) The notice of removal did not allege the timeliness of the removal. The amended notice of removal erroneously states:

Attempted service of Summons in this matter was received by CT Corporation System on behalf of Defendant, Plumrose, USA on September 6, 1995, as evidenced by the service of process transmittal form of CT Corporation attached as exhibit "A" well within thirty (30) day (sic) of removal.

The notice of removal was filed on September 14, 1995. As stated in the motion to remand, the transmittal form attached to the amended notice of removal reflects that CT Corporation received the summons and complaint on August 9, 1995. The defendant does not dispute this correction.

The first clause of the limitations provision applies in this cause since a copy of the complaint is required to be served on the defendant under the applicable state rules of procedure. The issue is whether receipt of the initial pleading alleging the plaintiff's claim "through service or otherwise" requires proper service of process in accordance with state procedural rules before the removal period commences. In opposition to the motion to remand, the defendant contends that the court should apply the proper service of process rule and conclude that the thirty-day period to remove has not begun to run since service of process has not been perfected. The plaintiff mailed copies of the summons and complaint to CT Corporation pursuant to Rule 4(c)(3) of the Mississippi Rules of Civil Procedure. The alleged defect in service of process is the defendant's own failure to return the acknowledgement form. The defendant further alleges that the

process was insufficient since the notice accompanying copies of the summons and complaint erroneously denoted chancery court instead of circuit court where this cause was commenced.

A split of authority has resulted in the proper service of process rule, e.g., Hunter v. American Express Travel Related Services, 643 F. Supp. 168 (S.D. Miss. 1986), and the receipt rule whereby the limitations period begins to run when the defendant or its agents authorized to accept service of process receive a copy of the complaint regardless of whether service conforms to state law. E.g., Roe v. O'Donohue, 38 F.3d 298 (7th Cir. 1994); Tech Hills II Associates v. Phoenix Home Life Mut. Ins. Co., 5 F.3d 963 (6th Cir. 1993). The Fifth Circuit has not ruled on this issue. However, the recent reported district decisions in this circuit have followed the receipt rule line of cases instead of Hunter. E.g., Blair v. Williford, 891 F.Supp. 349 (E.D. Tex. 1995); Valle Trade, Inc. v. Plastic Specialties & Technologies, Inc., 880 F. Supp. 499 (S.D. Tex. 1995); City of New Orleans v. Illinois Central R.R. Co., 804 F. Supp. 873 (E.D. La. 1992).

Although state law governs service of process in an action removed to federal court, "state law does not control for purposes of removal." Hughes Constr. Co. v. Rheem Mfg. Co., 487 F. Supp. 345, 347 n. 2 (N.D. Miss. 1980). Since the removal statutes must be strictly construed and the "or otherwise" language is unambiguous, the court concludes that the receipt rule is better

reasoned than the proper service rule. Under the proper service rule, the removal period would commence upon perfected service even if challenged and thus might expire before the court's ruling on the defendant's allegation of insufficient service. The receipt rule is consistent with the limitations period for cases that become removable after commencement -- thirty days after receipt of "an amended pleading. . . or other paper from which it may first be ascertained that the case is one which is or has become removable." Notice of removability is the underlying rationale of the receipt requirement. See Uhles v. F.W. Woolworth Co., 715 F. Supp. 297, 298 (C.D. Cal. 1989).

The court finds that the removal period began to run on August 9, 1995 at the time of CT Corporation's receipt of copies of the summons and complaint. The thirty-day period for removal is mandatory and, absent any waiver, remand is required if notice of removal is not timely filed. York v. Horizon Federal Sav. & Loan Ass'n, 712 F.Supp. 85, 86-87 (E.D. La. 1989) (citing Royal v. State Farm Fire and Casualty Co., 685 F.2d 124, 127 (5th Cir. 1982)). Since the notice of removal was untimely, the motion to remand should be granted.

"[K]nowledge of the nature of the claims, and not the state's technical rules of service, determines timeliness." Roe, 38 F.3d at 303. The alleged defects in process and service of process are not pertinent to the timeliness of the removal since they do not

defeat the actual notice of the removability of this cause given through mailed copies of the summons and complaint. The summons and complaint identified the state court in which this action was commenced. Thus, the typographical error in the notice had no bearing on the defendant's decision to file a notice of removal. See Arnold v. Federal Land Bank of Jackson, 747 F. Supp. 342, 344 (M.D. La. 1990) (process triggered the thirty-day removal period although it erroneously advised the defendant it had fifteen instead of thirty days to answer). With respect to the alleged incomplete service, clearly the defendant is not exempt from the limitations period on the basis of its own failure to return the acknowledgement form. The court in Roe reasoned:

A defendant cannot string things out by refusing to accept mail delivery, waiting for service in hand, and then waiting another 30 days to remove. Once the defendant possesses a copy of the complaint, it must decide promptly in which court it wants to proceed.

Id. at 303. For the foregoing reasons, the court finds that the alleged defects do not toll the limitations period. Therefore, this cause should be remanded without addressing the motion to dismiss.<sup>1</sup>

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<sup>1</sup>The Fifth Circuit has held that a district court may rule on a motion to dismiss for lack of personal jurisdiction before addressing a motion to remand. Villar v. Crowley Maritime Corp., 990 F.2d 1489 (5th Cir. 1993), cert. denied, 126 L. Ed. 2d 658 (1994). Alleged insufficiency of process and service of process are the primary grounds for the defendant's motion to dismiss. The alleged lack of personal jurisdiction is merely derivative of the allegedly defective process and service. Villar is distinguishable

The plaintiff requests an award of attorney's fees and costs incurred as a result of the removal under 28 U.S.C. §1447(c). In light of the split of authority, the court finds that such an award is inappropriate.

An order will issue accordingly.

THIS, the \_\_\_\_\_ day of January, 1996.

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**NEAL B. BIGGERS, JR.**  
**UNITED STATES DISTRICT JUDGE**

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in that the remand issue involved fraudulent joinder, i.e., whether the plaintiff could possibly prove that the court could constitutionally exercise personal jurisdiction over the nondiverse defendants. Id. at 1493-96. The Court in Villar reasoned:

[T]he district court must necessarily address the issue of personal jurisdiction regardless of which motion it addresses first.

Id. at 1494. The defendant in this cause concedes that it would not contest the exercise of personal jurisdiction if service of process were perfected.